No. 88-1377

Supreme Court, U.S.
FILED
JUL 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

BRIAN ZEBLEY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

KENNETH W. STARR
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

JOHN F. CORDES
MATTHEW M. COLLETTE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether regulations issued by the Secretary of Health and Human Services to govern the adjudication of claims for child's disability benefits under the Supplemental Security Income program established by Title XVI of the Social Security Act are consistent with the statutory provision that an individual under age 18 shall be considered to be disabled if he suffers from "any medically determinable physical or mental impairment of comparable severity" to one that would lead to a determination that an adult is disabled (42 U.S.C. 1382c(a)(3)(A)).

II

PARTIES TO THE PROCEEDING

The petitioner is the Secretary of Health and Human Services. The respondents are plaintiff Brian Zebley and intervenors Evelyn Raushi and Joseph Love, Jr., who represent a class, certified by the district court, of "[a]ll persons who are now, or who in the future will be, entitled to an administrative determination (whether initially, on reconsideration or on reopening) as to whether supplemental security income benefits are payable on account of a child who is disabled" (Pet. App. 6a).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1377

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

BRIAN ZEBLEY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 855 F.2d 67. The memorandum and order of the district court (Pet. App. 21a-24a) are reported at 642 F. Supp. 220.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1988, and a petition for rehearing was denied on October 18, 1988 (Pet. App. 25a). On January 9, 1989, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including February 15, 1989. The petition was filed on that date and was granted on May 15, 1989 (J.A. 260). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 1614(a)(3)(A) and (B) of the Social Security Act, 42 U.S.C. 1382c(a)(3)(A) and (B); Section 501(b) of the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2685; and 20 C.F.R. 416.924-416.926, are reproduced at App., *infra*, 1a-5a. Parts A and B of the Listing of Impairments in 20 C.F.R. Pt. 404, Subpt. P, Appendix 1, are reproduced at J.A. 115-235.

STATEMENT

A. The Statutory and Regulatory Scheme

1. The Supplemental Security Income (SSI) program established by Title XVI of the Social Security Act, 42 U.S.C. 1381 *et seq.* (1982 & Supp. IV 1986), provides for the payment of benefits to financially needy individuals who are aged, blind, or disabled. Unlike Title II of the Act, 42 U.S.C. 401 *et seq.* (1982 & Supp. IV 1986), which is an insurance program, Title XVI furnishes benefits without regard to insured status and is in the nature of a welfare program. *Bowen* v. *Galbreath*, 108 S. Ct. 892, 893 (1988).

The SSI program was enacted in 1972 and went into effect on January 1, 1974.[1] It replaced three of the four categorical assistance programs that previously had been funded under the Social Security Act, leaving in place only the Aid to Families with Dependent Children program under Title IV of the Act, 42 U.S.C. 601 *et seq.* (1982 & Supp. IV 1986). *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 37-39 & n.1 (1981); *Schweiker* v. *Hogan*, 457 U.S. 569, 581-582 (1982). The SSI program was principally intended "'[t]o assist those who cannot work because of age, blindness, or disability,' by 'set[ting] a

[1] Social Security Amendments of 1972, Pub. L. No. 92-603, §§ 301-306, 86 Stat. 1465-1485; *Schweiker* v. *Wilson*, 450 U.S. 221, 223 (1981).

Federal guaranteed minimum income level for aged, blind, and disabled persons.'" *Schweiker* v. *Wilson*, 450 U.S. 221, 223 (1981), quoting S. Rep. No. 1230, 92d Cong., 2d Sess. 4, 12 (1972).[2] However, it also provides for the payment of benefits to children under age 18 who are considered to be disabled. 42 U.S.C. 1382c(a)(3)(A). This case concerns the standards utilized by the Secretary of Health and Human Services to determine whether a child is disabled for purposes of the SSI program.

2. The Social Security Act provides that "[a]n individual shall be considered to be disabled" for purposes of the SSI program if he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to * * * last for a continuous period of not less than twelve months" (42 U.S.C. 1382c(a)(3)(A)).[3] This definition is identical to and was patterned after the definition in 42 U.S.C. 423(d)(1)(A), which is used in evaluating adult claimants under the Title II insurance program. See *Bowen* v. *Yuckert*, 482 U.S. 137, 140 (1987); S. Rep. No. 1230, *supra*, at 384. Because this vocationally oriented standard could not sensibly be applied to children (see pages 29-30, 36-37, *infra*), Congress further provided in Section 1382c(a)(3)(A) that

[2] To be eligible for SSI benefits, an individual's income and resources must be below the levels specified in 42 U.S.C. 1382(a) (1982 & Supp. IV 1986). *Schweiker* v. *Wilson*, 450 U.S. at 223 n.2. See also 42 U.S.C. 1382a (definition of and exclusions from income), 1382b (1982 & Supp. IV 1986) (exclusions from resources).

[3] Section 4 of the Social Security Disability Benefits Reform Act of 1984 (1984 Act), Pub. L. No. 98-460, 98 Stat. 1800, which became effective on December 1, 1984, requires that the combined effect of multiple impairments be considered throughout the disability determination process. See 42 U.S.C. 1382c(a)(3)(F) (Supp. IV 1986); *Bowen* v. *Yuckert*, 482 U.S. 137, 150-151 (1987). For convenience, however, we shall use the singular term "impairment" in this brief.

an individual under the age of 18 shall be considered to be disabled "if he suffers from any medically determinable physical or mental impairment of *comparable severity*" (emphasis added).

The basic definition of disability in paragraph (A) of 42 U.S.C. 1382c(a)(3) is supplemented by paragraph (B), which provides that "an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." This provision, which also is drawn directly from the Title II program (see 42 U.S.C. 423(d)(2)(A)), was originally enacted in 1967 in order to further describe the circumstances under which benefits may be awarded to adult claimants under Title II. *Yuckert*, 482 U.S. at 147-148. From the outset of the SSI program, the Secretary has interpreted the corresponding language in Section 1382c(a)(3)(B) that provides for consideration of non-medical factors—the claimant's "age, education and work experience"—to be inapplicable to children, because the statutory text contemplates that those factors will be taken into account only where it is appropriate to assess a claimant's ability to work. See pages 36-39, *infra*.

3. In 1978, the Secretary formally established a five-step sequential evaluation process for determining whether an adult is disabled for purposes of the SSI program. 20 C.F.R. 416.920; see *Heckler* v. *Campbell*, 461 U.S. 458, 460 (1983).[4] Although that process is not fully utilized in reviewing claims for child's disability benefits, an understanding of its operation will serve to illuminate the issues in this case.

[4] The sequential evaluation process under Title XVI is essentially the same as that under Title II. See 20 C.F.R. 404.1520; *Yuckert*, 482 U.S. at 140-142.

At step one of the sequential evaluation process, if an adult claimant is found to be engaged in substantial gainful activity, he is denied benefits. 20 C.F.R. 416.920(b). At step two, the claimant likewise is denied benefits if he fails to demonstrate that he has a "severe" impairment—*i.e.*, one that significantly limits his physical or mental ability to do basic work activities. 20 C.F.R. 416.920(c).[5]

If the claimant does have a "severe" impairment, the decision-maker then must determine at step three whether that impairment is included in the Listing of Impairments in Appendix 1 to the regulations (Pt. 404, Subpt. P) or is equal in severity to a listed impairment. 20 C.F.R. 416.920(d); see also 20 C.F.R. 416.925, 416.926. If the impairment is listed, or is medically equivalent to a listed impairment, then it is "acknowledged by the Secretary to be of sufficient severity to preclude gainful employment." *Bowen* v. *City of New York*, 476 U.S. 467, 470-471 (1986); see also *Yuckert*, 482 U.S. at 141.[6] Part A of the Listing is applicable to adults aged 18 and over. 20 C.F.R. 416.925(b)(1)). Part A is subdivided into categories of impairments affecting each principal body system, and it specifies in detail the medical "criteria" for each impairment—*i.e.*, the medical signs, findings, and symptoms and the requisite level of severity—that, if met, are considered sufficient in themselves to preclude gainful employment and therefore to result in a finding of disability on medical grounds alone. 20

[5] The step two severity regulation was sustained by this Court in *Yuckert*.

[6] We have reproduced the Listing at J.A. 115-235. The Listing appears as Appendix 1 to 20 C.F.R. Part 404, Subpart P, which governs disability determinations under the Title II program; it is not duplicated in Part 416 of 20 C.F.R., which governs Title XVI. The medical criteria in the adult portion of the Listing in Part A of Appendix 1 are applicable to both Title II and Title XVI. The additional medical criteria in the children's section of the Listing in Part B are applicable only to individuals under age 18.

C.F.R. 416.925(a) and (c). In addition, if the claimant's impairment is not included in the Listing, but the signs, findings and symptoms associated with it are medically equivalent to a listed impairment, he will be considered to be disabled on medical grounds alone. 20 C.F.R. 416.926. Accordingly, the regulations inform the claimant that if his impairment either meets or equals a listed impairment, "we will find you disabled without considering your age, education, and work experience." 20 C.F.R. 416.920(d).

If the adult claimant's impairment does not meet or equal a listed impairment, vocational considerations are then taken into account (together with medical factors) at steps four and five. See 20 C.F.R. 416.960. At step four, the decision-maker must determine whether the claimant is able to do his own relevant past work, despite his impairment; if so, he is considered not to be disabled. 20 C.F.R. 416.920(e), 416.961. But if the claimant cannot do his past work, the decision-maker then must determine at step five whether, considering the claimant's age, education and work experience, he can do other work that exists in the national economy; if so, he is considered not to be disabled. 20 C.F.R. 416.920(f), 416.962-416.969; see *Yuckert*, 482 U.S. at 141-142; *City of New York*, 476 U.S. at 471. Thus, the non-medical (or "vocational") factors of age, education and work experience—those specifically mentioned in 42 U.S.C. 1382c(a)(3)(B)—are taken into account at step five only if the decision-maker cannot determine at steps two and three that an adult claimant either is or is not disabled based on medical evidence alone and cannot determine at step four that the claimant is unable to perform his own past relevant work. 20 C.F.R. 416.920, 416.960.

In order to determine at steps four and five whether the claimant is able to do his own past work or other work in the national economy, the regulations provide for the decision-maker to assess the claimant's "residual functional capacity" (RFC). The RFC "is what [the

claimant] can still do despite [his] impairment" (20 C.F.R. 416.945); it "measures the claimant's capacity to engage in basic work activities." *City of New York*, 476 U.S. at 471. Thus, the RFC assessment is an evaluative device used to assist the decision-maker in making the determination that is expressly provided for by 42 U.S.C. 1382c(a)(3)(B) in the case of adults: whether a claimant whose impairment is not sufficiently severe based on medical considerations alone to be deemed disabling, nevertheless is disabled because he is unable to perform his own past work (when the demands of that job are considered together with his RFC) and also is unable to perform other work that exists in the national economy (when his age, education and work experience are considered together with his RFC). 20 C.F.R. 416.945(a).[7]

4. As noted above, although the basic definition of disability in 42 U.S.C. 1382c(a)(3)(A) provides that an adult claimant will be found disabled if he is unable to engage in any substantial gainful activity by reason of his impairment, a parenthetical clause at the end of paragraph (A) separately provides that an individual under age 18 will be considered disabled if he suffers from an impairment of "comparable severity." To give content to the standard of "comparable severity," the Secretary has promulgated regulations that provide for the evaluation of children seeking SSI disability benefits in a manner that is identical to that for adults in some respects but different (although parallel) in others.

Like adult claimants, children seeking disability benefits must not be engaged in substantial gainful activity and must suffer from an impairment that is likely to last at least twelve consecutive months. 20 C.F.R. 416.924(a)

---

[7] Section 416.945(a) of the regulations informs the claimant that "[t]his assessment of your remaining capacity for work is not a decision on whether you are disabled, but is used as the basis for determining the particular types of work you may be able to do despite your impairment."

and (b)(1). In addition, a child will be found disabled if his impairment meets or equals one of the impairments contained in the Part A Listing utilized for adults—if, for the particular impairment in the Part A Listing, "the disease processes have a similar effect on adults and younger persons." 20 C.F.R. 416.925(b)(1); see 20 C.F.R. 416.924(b)(2) and (3).

Vocational considerations, however, have little relevance in the evaluation of individuals under age 18, because children rarely have any significant history of past employment and generally are not expected to engage in substantial gainful activity. Consequently, under the Secretary's regulations, a child whose impairment does not meet or equal an impairment in the adult Part A Listing is not then evaluated on the basis of his capacity to perform prior work or other work in the national economy (in light of his RFC, age, education, and work experience). Instead, an individual under age 18 is evaluated under a special Listing of Impairments in Part B of Appendix 1 containing additional medical criteria that are deemed sufficiently severe in children to be disabling. See 20 C.F.R. 416.924(b)(2) and (3), 416.925(b)(2).[8] The Secretary explained when he formally published the Part B Listing in 1977 that the physicians and other experts who assisted in developing it "placed primary emphasis on the effects of physical and mental impairments in children, the impact of the impairment on the child's activities, and the restrictions on growth, learning, and development imposed on the child by the impairments." 42 Fed. Reg. 14,705 (1977). "Those impairments which were determined to impact on the child's

[8] The regulations explain that this additional Listing in Part B is included because "[c]ertain criteria in Part A do not give appropriate consideration to the particular effects of the disease processes in children; i.e., when the disease process is generally found only in children or when the disease process differs in its effect on childhood than on adults." 20 C.F.R. 416.925(b)(2).

development to the same extent that the adult criteria have on an adult's ability to engage in substantial gainful activity were deemed to be of 'comparable severity' to the adult listing." *Ibid.*

B. The proceedings in this case

1. This action was filed by respondent Brian Zebley in the United States District Court for the Eastern District of Pennsylvania on July 12, 1983 (Pet. App. 5a; J.A. 1, 16-25). Zebley had been granted child's disability benefits in September 1980, when he was two years old, on the basis of congenital brain damage with spastic right hemiparesis (a weakness affecting the muscles) and mental retardation (J.A. 20-21, 28). After a scheduled periodic review of his eligibility, Zebley was found no longer to be disabled as of June 1982, on the ground that the then-current medical evidence demonstrated that his impairments no longer met or equaled the criteria in the Listings of Impairments. The ALJ agreed that Zebley was no longer disabled (J.A. 40-47), and the Appeals Council denied review (J.A. 38-39). In his individual action for judicial review under 42 U.S.C. 405(g) and 1383(c)(3), Zebley contended that the decision terminating his benefits was not supported by substantial evidence (Pet. App. 5a-6a; see J.A. 23).

Zebley also sought to represent a class of applicants for and recipients of child's disability benefits. On behalf of the class, he alleged that the Secretary's policies and regulations for evaluating child's disability claims violate 42 U.S.C. 1382c(a)(3)(A), because they do not provide for "individualized consideration of pertinent facts such as capacity to undertake basic activities, learning, growth, development, academic attainment, school performance and capacities and functional limitations imposed by physical or mental impairments" (J.A. 22; see Pet. App. 6a). Zebley contended that such an assessment is re-

quired for children because the Secretary considers both medical and vocational factors in evaluating adults and because 42 U.S.C. 1382c(a)(3)(A) provides that a child shall be considered to be disabled if he suffers from an impairment of "comparable severity" (J.A. 21-23).[9]

On January 10, 1984, the district court certified a class consisting of "[a]ll persons who are now, or who in the future will be, entitled to an administrative determination (whether initially, on reconsideration, or on reopening) as to whether [SSI] benefits are payable on account of a child who is disabled, or as to whether such benefits have been improperly denied, or improperly terminated, or should be resumed" (Pet. App. 6a; J.A. 26-27). Thereafter, on October 12, 1984, the court granted Zebley's motion for partial summary judgment on his individual claim. It held that the Secretary's decision terminating Zebley's benefits was not supported by substantial evidence that his medical condition had improved, as was then required in disability cessation cases by the Third Circuit's decision in *Kuzmin* v. *Schweiker*, 714 F.2d 1233, 1237 (1983). Pet. App. 6a; see J.A. 28-35.[10]

With respect to the class claim, however, the district court, in a decision dated July 16, 1986, granted the Secretary's motion for summary judgment (Pet. App.

[9] In the fall of 1983, the district court granted motions to intervene filed by Joseph Love, Jr., whose claim for SSI child's disability benefits had been denied (J.A. 48-58), and Evelyn Raushi, whose SSI child's disability benefits had been terminated (J.A. 59-66). Pet. App. 6a.

[10] Similarly, on March 13, 1985, the court granted the Secretary's uncontested motion to remand intervenor Raushi's claim to the Secretary for redetermination under the new statutory "medical improvement" standard in Section 2 of the 1984 Act, 98 Stat. 1794, 42 U.S.C. 423(f) (Supp. IV 1986) (J.A. 36). Compare *Heckler* v. *Kuehner*, 469 U.S. 977 (1984); *Heckler* v. *Lopez*, 469 U.S. 1082 (1984).

21a-24a). It rejected respondents' contention that the regulations are invalid on their face because "a child claimant should have the same opportunity to prove inability to function adequately in a child's environment as that which is provided the adult claimant under the 'residual functional capacity' rubric" (*id.* at 23a). Relying on decisions of the First and Eleventh Circuits rejecting "[s]trikingly similar challenges" (*ibid.*, citing *Hinckley* v. *Secretary of HHS*, 742 F.2d 19 (1st Cir. 1984), and *Powell* v. *Schweiker*, 688 F.2d 1357 (11th Cir. 1982)), the court concluded that "the Secretary's listing[] of impairments * * * is not facially invalid or incomplete, seems to provide the necessary flexibility, and * * * permits the award of benefits in conformity with the intent of Congress" (Pet. App. 23a, 24a). "If these criteria are being misapplied or misinterpreted," the court noted, "the remedy lies in the appeal process in individual cases, not in a class-action decree" (*id.* at 24a).[11]

2. The court of appeals reversed and remanded the case to the district court with directions to enter summary judgment in favor of the plaintiff class (Pet. App.

[11] After disposing of the class claim, the court, on April 23, 1987, granted the stipulated motion by the Secretary and the remaining named plaintiff, intervenor Love, to remand his claim to the Secretary to be reevaluated under the revised criteria in the listing of mental impairments that were issued by the Secretary pursuant to Section 5(a) of the 1984 Act, 98 Stat. 1801 (J.A. 37). See 50 Fed. Reg. 35,069 (1985); *City of New York*, 476 U.S. at 486 n.14. In a decision dated July 29, 1988, the Appeals Council held, on the basis of the ALJ's extensive review of the evidence, that Love did not have an impairment that met or equaled a listed impairment prior to November 15, 1985, but that he did have a mental impairment (a personality disorder) that equaled the criteria in Section 12.08 of both the adult and child's Listings after that date. On December 15, 1988, Love filed a motion in the instant case to remand his claim back to the Secretary for reevaluation of his eligibility for the period prior to November 13, 1985, in light of the Third Circuit's holding in this case that the Secretary may not rely solely on the Listings in child's disability cases.

1a-20a). The court acknowledged that the SSI statute grants the Secretary "'full power and authority to make rules and regulations and to establish procedures'" to implement the SSI program, as long as they are "'not inconsistent'" with the statute (*id.* at 9a, quoting 42 U.S.C. 405(a); see 42 U.S.C. 1383(d)(1) (1982 & Supp. IV 1986)); and it further acknowledged that "Congress did not describe explicitly a *method* for determining whether a claimant is disabled" (Pet. App. 9a (emphasis in original)). Nevertheless, the court invalidated the child's disability regulations to the extent they provide that a claimant is disabled only if he has an impairment that meets or equals a listed impairment and do not provide for an individualized assessment of a claimant's functional limitations in the same manner that the Secretary makes an assessment of an adult claimant's RFC (*id.* at 9a-17a, 20a).

The court of appeals rested its conclusion principally on the language in 42 U.S.C. 1382c(a)(3)(A) stating that a claimant shall be considered disabled if he suffers from "any" impairment that is of comparable severity. See Pet. App. 7a, 11a, 12a, 13a, 17a. In the court's view, because the regulations provide for "individualized assessment of the *actual* degree of functional impairment of adults whose medical findings do not entitle them to a *presumption* of disability by meeting or equaling the listings," children "[must] be given the opportunity to show that they suffer from 'any' impairment of 'comparable severity' to one which would actually, even if not presumptively, disable an adult" (Pet. App. 11a-12a (emphasis in original)).

The court of appeals acknowledged that it was "in the minority among courts which have considered the legality of these regulations" (Pet. App. 16a), but it declined to follow the decisions of other courts sustaining the Secretary's approach. The court specifically rejected the Eleventh Circuit's conclusion in *Powell*, 688 F.2d at 1360, that the Listing of children's impairments in Part B satisfies the statutory "comparable severity" requirement

because the severity of some impairments is evaluated in terms of a child's ability to perform age-appropriate activities, which is sufficiently "comparable to [consideration of] vocational factors for adults" (Pet. App. 13a). In its view, this parallel for some impairments did not satisfy the statutory language that a child's disability may be based on "any" impairment of comparable severity. The court also rejected the First Circuit's conclusion in *Hinckley*, 742 F.2d at 23, that the Secretary's regulations "allow[] for an assessment of a child's mental or physical limitations on an individual basis by providing that a child may be found disabled if his impairment 'is determined by [the Secretary] to be medically equal to an impairment listed in [the appendix].'" The court recognized that medical equivalence to a listed impairment must be based on medical findings, that "it is functional impairment which is meant to be evidenced by the medical findings," and that "[i]t is *only* impaired ability to function which results in disability" (Pet. App. 13a (emphasis in original)). But, relying on a statement in Social Security Ruling (SSR) 83-19 (see J.A. 236-243) that RFC is not considered in determining medical equivalence (J.A. 240), the court held that "something more is necessary in order to determine whether the degree of a claimant's impairment satisfies the statutory standard for disability" (Pet. App. 13a).

Although the court of appeals invalidated the child's disability regulations to the extent they require a claimant's impairment to meet or equal the Listing, it rejected respondents' contention that those regulations are inconsistent with the requirement in Section 4 of the Social Security Disability Benefits Reform Act of 1984 that the Secretary consider the combined effect of several impairments. See 42 U.S.C. 1382c(a)(3)(F) (Supp. IV 1986); *Yuckert*, 482 U.S. at 150-152. The court explained that the regulations incorporate the statutory mandate "by providing expressly that multiple impairments will be considered in assessing medical equivalence,

20 C.F.R. § 416.926, and by providing generally that the combined effect of all of a claimant's impairments will be considered throughout the disability determination process. 20 C.F.R. § 416.923." Pet. App. 18a.[12]

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals in this nationwide class action invalidated the regulations that have been utilized by the Secretary of Health and Human Services for over fifteen years to adjudicate claims for child's disability benefits under the Supplemental Security Income (SSI) program established by Title XVI of the Social Security Act, 42 U.S.C. 1381 *et seq.* Those regulations are designed to give specific content to the statutory definition of "disability" as applied to individuals under age 18, which provides that such an individual shall be considered to be disabled if he suffers from an impairment that is of "comparable severity" to an impairment that would render an adult disabled. 42 U.S.C. 1382c(a)(3)(A). To implement that most general of statutory standards, the regulations at issue supplement the Listing of Impairments that the Secretary has found to be sufficiently severe for adults to preclude work activity (irrespective of vocational factors) with a special Listing of Impairments that applies only to individuals under age 18. This special supplementary Listing takes into account the particular effects of disease processes in children and is designed to identify impairments that have an impact on a child's development that is comparable to the impact of impairments that would prevent an adult from engaging in substantial gainful activity.

[12] The court of appeals also rejected respondents' contention that the Secretary did not fully comply with the requirements of Section 5(a) of the 1984 Act (see note 11, *supra*), because he revised the mental impairment criteria in the Part A Listing for adults but not in the Part B Listing for children. The court noted that there was no express reference in Section 5(a) to the Part B mental impairment criteria for children and that the purpose of the statutorily mandated revision, as set forth in Section 5(a) itself, was to assure that the "criteria and listings" "realistically evaluate the ability of a mentally impaired individual to engage in substantial gainful activity in a competitive workplace environment" (98 Stat. 1801)—a purpose that does not apply to children (Pet. App. 18a-19a).

This case involves a challenge to the facial validity of the Secretary's child disability regulations. Respondents contend, and the court of appeals held, that the Secretary may not rely on the Listing as the objective and uniform measure of the level of medical severity that children's impairments must meet or equal in order for them to be found disabled. Instead, they maintain, in *every* case in which a child does not have a medical condition of sufficient severity to meet or equal the Listing of impairments, the decision-maker must undertake an amorphous, case-by-case assessment of each child's residual abilities and unspecified non-medical factors that would be analogous to an adult claimant's vocational factors of age, education and work experience. This would occur despite the fact that the Secretary has already determined that the child does not have an impairment or a combination of impairments that would affect the child's development in a manner comparable to the effect of impairments on an adult's ability to work.

Since the only question before the Court concerns the facial validity of the Secretary's regulatory methodology, no question is presented concerning the adequacy of either Part A or Part B of the Listing of Impairments or the application of the Listing in particular cases. As the district court observed, "[i]f these criteria are being misapplied or misinterpreted, the remedy lies in the appeal process in individual cases, not in a class-action decree" (Pet. App. 24a). Nor is there any question before this Court as to whether particular amendments to the Part B Listing should be considered in the future (as they have been in the past) to take account of any additional impairments that may be shown by experience or medical advances to have the requisite impact on development in

children. The sole question to be decided is whether, no matter how exhaustive the Part A and Part B Listings of Impairments and their medical equivalents might be, the Secretary must nevertheless undertake an individualized assessment of a child's non-medical factors and residual functional capacity in order to satisfy the "comparable severity" standard of the statute.

The initial inquiry in answering this question, as the court of appeals recognized (Pet. App. 11a), is "whether Congress has directly spoken on the precise question at issue." See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court of appeals concluded that Congress had in fact addressed this precise issue: if the Secretary undertakes an individualized assessment of vocational factors and residual functional capacity in cases involving adults, the court reasoned, then the Secretary must also undertake such an inquiry in cases involving children; otherwise, the Secretary will not be awarding benefits to children in all cases involving impairments of "comparable severity." This superficial analysis, however, overlooks a number of key features of the statutory language.

On the one hand, where Congress spoke of child's disability benefits—in the parenthetical clause at the end of paragraph (A) of 42 U.S.C. 1382c(a)(3)—it referred only to impairments of *comparable* severity, not *identical* severity. The use of the word "comparable" suggests a fairly wide range of latitude. Congress in this brief clause also spoke in terms of the degree of severity of the physical or mental impairment itself, not in terms of the regulatory method for ascertaining the existence of such an impairment. Thus, paragraph (A) cannot be read as an express mandate that the Secretary follow the same five-part sequential evaluation process with children as with adults. On the other hand, paragraph (B) of the statutory definition of disability, 42 U.S.C. 1382c(a)(3)(B)—which is the provision that mandates a case-specific inquiry into non-medical factors and residual functional capacity with respect to adults—makes no mention of children and includes no parenthetical comparability clause. This silence is significant, for if Congress had directly spoken to the issue, the most logical way to do so would be to include such a "comparability" clause in paragraph (B) analogous to the parenthetical clause that appears in paragraph (A).

It is also significant that the principle on which the Secretary's regulations are based—that a child will be found to be disabled only if his impairment meets or equals a listed impairment, taking into account special impacts of impairments on children—was embodied in the regulations promulgated by the Secretary at the outset of the SSI program in January 1974. Congress was apprised of this approach in 1976, and yet it adopted legislation directing the Secretary to publish the criteria for children that he had developed to implement that approach and that became Part B of the Listing of Impairments. This Court has observed that where Congress has been apprised of an agency's interpretation of a statute, and amends the statute in other respects, "then presumably the legislative intent has been correctly discerned." *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979). That presumption of correctness applies *a fortiori* where, as here, Congress not only declines to overturn the agency's interpretation, but affirmatively directs the agency to take action that implements its interpretation.

Not only does the methodology embodied in the regulations represent a contemporaneous construction of the statute by the agency charged with implementing it, the Secretary has also consistently adhered to that approach in the adjudication of thousands of child's disability claims each year. Contemporaneous, longstanding and consistently maintained regulations are entitled to great deference. Indeed, other courts of appeals have sustained the Secretary's approach as a reasonable implementation of the statutory standard. See *Hinckley* v.

Secretary of HHS, 742 F.2d 19 (1st Cir. 1984); *Powell* v. *Schweiker*, 688 F.2d 1357 (11th Cir. 1982); *Wilkinson* v. *Bowen*, 847 F.2d 660, 661 (11th Cir. 1987); *Petreleoni* v. *Secretary of HHS*, No. 87-2021 (10th Cir. Oct. 26, 1988) (unpublished); cf. *Williams* v. *Bowen*, 859 F.2d 255, 260 (2d Cir. 1988); *Burnside* v. *Bowen*, 845 F.2d 587, 590-591 (5th Cir. 1988).[18] The court below erred in holding that regulations so firmly grounded in statutory text and congressional intent and in the long-standing administration of the SSI program are wholly beyond the Secretary's authority.

Nor can it credibly be maintained that the Secretary's regulations are arbitrary and capricious. The criteria in the special Part B Listing for children in fact *do* take into account functional and developmental consequences of impairments and their impact on ability to do age-appropriate activities where those factors are germane to particular impairments. In other words, the considerations that respondents would require the Secretary to consider on an individualized basis were taken into account in the formulation of the Part B Listing in the first place. As a result, the criteria in the Listing *already* embody the level of impairment severity that, in the Secretary's judgment, has an impact on development in a child comparable to the impact of an impairment on an adult's ability to work.

Moreover, if the decision-makers in the state agencies and SSA were required to depart from the Listing for children on an individualized basis, their inquiry in thousands of cases annually would not be anchored in any objective benchmark for determining when a child's functional impairment is sufficiently severe that he should be

[18] The question of the regulations' validity is also pending before the Eighth Circuit in *Nash* v. *Bowen*, No. 88-2542, in which oral argument was held on May 9, 1989, and before the Ninth Circuit in *Burt* v. *Bowen*, No. 88-3990, which has not yet been scheduled for oral argument. There are district court cases going both ways on the issue. Pet. App. 16a-17a nn.4, 5; Reply Br. 6 n.4.

considered disabled. For adults, the non-medical factors of age, education and work experience, which are specified in the Act itself, can be readily ascertained and quantified in each case, and the purpose of the inquiry—determining the claimant's ability to work—is objectively anchored. But children do not generally work, and are not ordinarily expected to work. Neither respondents nor the court of appeals have offered any analogue to work that could be applied to all children in an administratively feasible manner; certainly, no special benchmark for measuring the residual functional capacity of children has been specified by Congress. The difficulties and potential for disuniformity resulting from the uncharted inquiry mandated by the court of appeals would impose an unreasonable burden on the agency—a burden that cannot be justified on the basis of the slender statutory reed of the word "any" contained in Section 1382c(a)(3)(A).

ARGUMENT

THE SECRETARY'S REGULATIONS GOVERNING THE EVALUATION OF SSI CHILD'S DISABILITY CLAIMS ARE FULLY CONSISTENT WITH THE STATUTORY REQUIREMENT THAT A CHILD'S IMPAIRMENT BE OF "COMPARABLE SEVERITY" TO AN IMPAIRMENT THAT WOULD RENDER AN ADULT DISABLED

A. The Secretary Has Broad Authority to Issue Legislative Regulations to Implement the Statutory Standards of Disability

Like *Heckler* v. *Campbell*, 461 U.S. 458 (1983), and *Bowen* v. *Yuckert*, 482 U.S. 137 (1987), this case involves a facial challenge to regulations issued by the Secretary of Health and Human Services to implement the basic statutory definition of "disability" under the Social Security Act. Congress drafted the definition of disability in very general terms, and entrusted the Secretary to use his accumulated "experience and expertise" (*Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975)) to give it

particularized content. The regulations promulgated by the Secretary to implement these general guidelines play a critical role in the administration of what by all accounts is a massive program. The Social Security Administration (SSA) is "'probably the largest adjudicative agency in the western world.'"[14] Together with adjudicators in the state agencies, SSA must review more than 2 million claims for various categories of disability benefits annually under the Social Security Act. *Yuckert*, 482 U.S. at 153.[15] In a program this vast and multifaceted, detailed implementing standards are essential to ensure uniformity and fairness of administration.

In developing and revising these implementing regulations, the Secretary relies upon his Department's extensive experience gained in administering the disability and related social-welfare programs. In particular, the Secretary draws upon the advice of physicians and other experts, the insights gained by the state disability agencies and his own ALJs and Appeals Council in their adjudication of thousands of claims raising similar issues, and the intimate familiarity of his Department with the constant evolution of the programs through a process of legislative and administrative oversight and amendment. The regulations at issue here are the considered product of that elaborate process. See pages 36-39, *infra*.

As the Court has recognized in rejecting facial challenges to other provisions of the Secretary's disability regulations, "'Congress has "conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the Act."'" (*Bowen* v. *Yuckert*, 482 U.S. at 145, quoting *Heckler* v. *Campbell*, 461

[14] *Heckler* v. *Campbell*, 461 U.S. at 461 n.2, quoting J. Mashaw, et al., *Social Security Hearings and Appeals* at xi (1978).

[15] The SSI children's disability program is itself of substantial proportions. We have been informed by SSA that as of March, 1989, there were 294,000 children receiving disability benefits under the program, and that approximately 40,000-45,000 children become newly eligible for child's disability benefits each year.

U.S. at 466, and *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 43 (1981)). The Secretary's authority in this case, as in *Yuckert* and *Campbell*, derives in the first instance from 42 U.S.C. 405(a), as made applicable to the SSI program by 42 U.S.C. 1383(d)(1) (1982 & Supp. IV 1986). Section 405(a) provides that the Secretary "shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of [the Act], which are necessary or appropriate to carry out such provisions," and that he "shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder."

Congress made the delegation of authority to the Secretary even more explicit with respect to the very subject at issue here when it enacted Section 501(b) of the Unemployment Compensation Amendments of 1976 (1976 Act), Pub. L. No. 94-566, 90 Stat. 2685. Section 501(b) directed the Secretary, within 120 days after enactment of the 1976 Act, to "publish criteria to be employed to determine disability (as defined in [42 U.S.C. 1382c(3)(A)] of the Social Security Act) in the case of persons who have not attained the age of 18" (90 Stat. 2685). The regulations challenged by respondents, and invalidated by the court of appeals, were promulgated pursuant to this express directive in 1977. See pages 32-33, 38, *infra*.

This Court has repeatedly stressed that such regulations are subject to only a very narrow scope of review. Where, as here, an agency's regulations are challenged on the ground that they are inconsistent with the statute they implement, this Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), establishes a general two-part framework for analysis. "First, always, is the question whether Congress has directly spoken to the precise question at

issue." *Id.* at 842. This question must be answered by "employing traditional tools of statutory construction" (*id.* at 842 n.9), and, in particular, by examining "[t]he words, structure, and history" of the statutory provision in question. *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 108 S. Ct. 413, 421 (1987); see also *INS* v. *Cardozo-Fonseca*, 480 U.S. 421, 446-449 (1987); *Young* v. *Community Nutrition Institute*, 476 U.S. 974, 980-981 (1986). If, however, the reviewing court determines that "Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843 (footnotes omitted).

The deference to agency views reflected in this framework applies with special force where, as in this case, Congress has explicitly delegated authority to an administrative agency to implement a general statutory mandate with specific regulatory standards. Indeed, when Congress has delegated legislative authority to an agency, step one of the *Chevron* inquiry is quickly answered: Congress could not harbor a specific intention on the precise question at issue and yet at the same time direct an agency to develop an answer to that question. As this Court has observed, "[i]n a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term." *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977). This Court has accordingly indicated that the standards adopted by an agency pursuant to an express grant of rulemaking power are entitled to "legislative effect," and they are given controlling weight "'unless [they are] arbitrary, capricious, or manifestly contrary to the statute.'" *Atkins* v. *Rivera*, 477 U.S. 154, 162 (1986), quoting *Chevron*, 467 U.S. at 844.[18]

As we shall now show, neither the court of appeals nor respondents have shown that the method adopted by the Secretary for determining whether children suffer from medical impairments of "comparable severity" to those which are disabling for adults is manifestly contrary to the statute. Nor have they shown in any way that the methodology embodied in the regulations at issue here is arbitrary or capricious. To the contrary, the regulations are based on a reasonable, contemporaneous, and longstanding interpretation and implementation of the statutory standard of "comparable severity."

B. Congress Has Not Addressed the Question of What Regulatory Method Should Be Used in Determining Whether Children Suffer from an Impairment of "Comparable Severity" to One That Would Be Considered Disabling for an Adult

1. The general definition of disability set forth in the Social Security Act provides that an otherwise eligible adult is entitled to SSI disability benefits "if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months" (42 U.S.C. 1382c(a)(3)(A)). Congress did not apply this same test

---

[18] Accord *Yuckert*, 482 U.S. at 145, quoting *Campbell*, 461 U.S. at 466 ("'Where, as here, the statute expresly entrusts the Secretary with the responsibility for implementing a provision by regulation, [a court's] review is limited to determining whether the regulations promulgated exceeded the Secretary's statutory authority and whether they are arbitrary and capricious.'"); *United States* v. *Morton*, 467 U.S. 822, 834 (1984) ("Because Congress explicitly delegated authority to construe the statute by regulation, in this case we must give the regulations legislative and hence controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute.").

to claimants under age 18, however, for the obvious reason that most children, simply by reason of their youth, are unable to engage in "any substantial gainful activity." Instead, Congress inserted at the end of the general definition of disability in paragraph (A) the following clause: "(or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity)." Congress did not, however, define the critical term "comparable severity." The Act therefore leaves it to the Secretary to give content to that term pursuant to his "exceptionally broad authority" under 42 U.S.C. 405(a) and 1383(d)(1) (1982 & Supp. IV 1986) (see *Yuckert*, 482 U.S. at 145, quoting *Campbell*, 461 U.S. at 466), as augmented by the specific directive to the Secretary in Section 501(b) of the 1976 Act to "publish criteria to be employed to determine disability * * * in the case of persons who have not attained the age of 18."

Several features of the statutory language support the conclusion that Congress did not intend to require the Secretary to follow the same methodology for determining disability in children as is used with adults. First, Congress did not direct that the severity of impairments for adults and children be identical, only that they be "comparable." As the term is commonly used, "comparable" does not require complete similarity. Rather, the term connotes circumstances "permitting or inviting comparison[,] often in one or two salient points only" (*Webster's Third New International Dictionary* 461 (1976)). Comparison "invites an examination of differences as well as resemblances." *DeJesus* v. *Perales*, 770 F.2d 316, 324 (2d Cir. 1985), cert. denied, 478 U.S. 1007 (1986). And the concept of comparability does not rigidly require uniformity insofar as the subjects to be compared "are different in a fundamental way." *Atkins* v. *Rivera*, 477 U.S. at 164 n.8. Accordingly, the central statutory term—"comparable severity"—is most reasonably interpreted as contemplating that the Secretary will take account of the differences as well as the similarities in children and adults. The Secretary has done exactly that, by following an essentially identical procedure for adults and children, except for an individualized consideration of non-medical factors and residual functional capacity which the Secretary has determined cannot be applied to children in a meaningful or administratively feasible manner.

Second, although the text of paragraph (A) prescribes a test for adults that focuses on the consequences of the impairment, *i.e.*, whether the claimant is unable to engage in substantial gainful activity "by reason of" the impairment, the parenthetical reference to children does not expressly mention or even allude to consequences. By its terms, the statute's reference to children focuses exclusively on the existence of a "medically determinable physical or mental impairment" of the requisite degree of severity ("comparable"), not on whether the child personally retains the residual ability, despite the impairment, to perform "substantial gainful activity" or some other "activity" that is appropriate for children in general or children of the claimant's age in particular.

Third, the pivotal term "severity" has been used by the Secretary and Congress under the Social Security disability programs to refer to a *medically* severe impairment, the degree of which is based on medical evidence alone. This Court recognized as much in *Yuckert*, where it sustained the Secretary's regulation requiring an adult claimant to show at step two of the sequential evaluation process that his impairment satisfies a threshold level of "severity." The majority in *Yuckert* specifically rejected the dissent's proposal to "make the severity of the claimant's *medical* impairment turn on *nonmedical* factors such as education and experience" (482 U.S. at 149 n.7 (emphasis in original)). That usage is also reflected in Section 4(a)(1) and (b) of the Social Secu-

rity Disability Benefits Reform Act of 1984, 98 Stat. 1800, which ratifies the severity regulation by referring to the threshold test of whether the claimant's impairment is of sufficient "medical severity" (42 U.S.C. 1382c(a)(3)(F) (Supp. IV 1986) quoted in *Yuckert*, 482 U.S. at 150). See also 482 U.S. at 151-152 (discussing legislative history of 1984 Act referring to determinations of severity based on medical evidence alone, without consideration of age, education, and work experience).[17] The Secretary's regulations for determining child's disability define "comparable severity" in a similar manner: they provide that the "severity" of a child's impairment is to be based on medical factors and evidence alone, without individualized consideration of vocational or similar non-medical factors (or, therefore, of the claimant's RFC).[18] The regulations under challenge are therefore supported by Congress's use of the term "severity" in 42 U.S.C. 1382c(a)(3)(F) (Supp. IV 1986) and elsewhere in the Social Security Act.

Fourth, none of the language in paragraph (A) of Section 1382c(a)(3) suggests that because the Secretary chooses to adopt a particular method for determining disability in adults based on a sequential evaluation process, he must do so for children, and in the process incorporate a consideration of factors akin to an adult's age, education, work experience and RFC. Specifically, Section 1382c(a)(3)(A) does not require the Secretary to use the "same methodology" for both children and adults.

[17] See also 482 U.S. at 148, quoting S. Rep. 744, 90th Cong., 1st Sess. 48-49 (1967) (claimant is disabled " 'only if it is shown that he has a severe medically determinable physical or mental impairment or impairments' ").

[18] Of course, the determination of what kinds of physical or mental impairments will be regarded as severe is based on the impact of the impairment on development in children, just as the regulation at issue in *Yuckert* measured the severity of an impairment in terms of whether it substantially limits the claimant's ability to do basic work-related activities. See 482 U.S. at 141, 146.

Compare 42 U.S.C. 1396a(a)(10) (1982 & Supp. IV 1986), discussed in *Atkins* v. *Rivera*, 477 U.S. at 158. It requires only that a child's impairment be of "comparable severity" to that which would cause an adult to be considered disabled.

Finally, the fact that the parenthetical reference to children in 42 U.S.C. 1382c(a)(3)(A) speaks of "any" physical or mental impairment does not detract from the discretion conferred by the general term "comparable severity." The court of appeals seized on Congress's use of the word "any," observing that "Congress has expressed unambiguously its intent that 'any' impairment which meets the statutory standard shall be found disabling" (Pet. App. 11a). That is true; but it begs the question at issue: What is the statutory standard applicable to children? Congress simply did not say. It chose, rather, to leave the term, "comparable severity," undefined. Of course, within the regulatory framework established by the Secretary, "any" impairment that satisfies the prescribed standards—*i.e.*, any impairment that meets or equals an impairment in the adult Listing or the special children's Listing—renders a child eligible for benefits. That result fully satisfies the statutory language upon which the court of appeals relied.[19]

[19] Respondents argue (Br. in Opp. 20-22) that the Secretary's regulations are inconsistent with Sections 4(b) and 9(b)(1) of the Social Security Disability Benefits Reform Act of 1984, 42 U.S.C. 1382c(a)(3)(F) and 423(d)(5)(B) (Supp. IV 1986). The latter requires the Secretary to consider all evidence in the claimant's case record, and the former requires the Secretary to consider the combined effect of several impairments at each step of the sequential evaluation process. See *Yuckert*, 482 U.S. at 149-152. Respondents' reliance on the 1984 Act is misplaced. Section 9(b)(1) does not modify any substantive standards of disability; it is concerned only with the evidence on which a decision under those standards must be made. As the court of appeals recognized (Pet. App. 17a-18a), Section 4(b) likewise lends no support to respondents' position. Even before the 1984 Act was passed, Social Security Ruling

2. The conclusions drawn from consideration of the language of paragraph (A) of 42 U.S.C. 1382c(a)(3)—that Congress left the method of determining comparable severity to the Secretary and that the method chosen by the Secretary is fully consistent with the statute—finds further support in paragraph (B) of that provision. Paragraph (B) contemplates, in the case of an adult claimant, that the Secretary will engage in an individualized inquiry into whether "his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy" (42 U.S.C. 1382c(a)(3)(B)).[20] But paragraph (B) does not identify any nonmedical factors that must be considered on an individual-

(SSR) 83-19 provided that the combined impact of several impairments could be considered in determining whether a claimant's impairments equalled the listings. See J.A. 239. That requirement is carried forward under current regulations. See 20 C.F.R. 416.923 (stating that the combined effect of multiple impairments will be considered "throughout the disability determination process"); 20 C.F.R. 416.926(a) (explaining the method for determining whether a claimant's "impairment(s) is medically equal to a listed impairment"). In light of these regulatory provisions and SSR 83-19, respondents err in contending (Br. in Opp. 8, 21) that the Listings do not allow for consideration of the combined effect of multiple impairments. The 1984 Act therefore casts no doubt on the Secretary's longstanding approach to evaluating claims for child's disability benefits, and respondents in fact point to no evidence of congressional intent in 1984 to mandate a change in that approach.

[20] This inquiry is required only if the claimant's impairment satisfies the threshold level of severity that is applied at step two of the sequential evaluation process for adults. See *Yuckert*, 482 U.S. at 148-149. Even so, 42 U.S.C. 423(d)(2)(A), after which 42 U.S.C. 1382c(a)(3)(B) was patterned, was enacted in 1967 as part of amendments designed to "reemphasize the predominant importance of medical factors in the disability determination." *Yuckert*, 482 U.S. at 148, quoting S. Rep. No. 744, 90th Cong., 1st Sess. 48 (1967).

ized basis *in children* in the same manner that an adult claimant's age, education, and work experience are taken into account. Nor does paragraph (B) direct that the functional abilities of the child (notwithstanding the impairment) be considered on an individualized basis in children in a manner that is analogous to the individualized consideration (by use of the RFC assessment) with respect to an adult claimant's ability to work. It does not, for example, require an individualized inquiry into whether the child retains the residual ability to perform "age-appropriate" activities, as respondent suggests (Br. in Opp. 28).

Perhaps most significantly, paragraph (B) of Section 1382c(a)(3), unlike paragraph (A), has no parenthetical "comparability" clause. The presence in paragraph (B) of such a clause (providing for "comparable" treatment) might have been understood to require the sort of parallel that respondents and the court below urge between the disability determination process for children and the individualized assessment of an adult claimant's vocational factors and residual ability to work. The absence of such a clause, by contrast, substantially undercuts that position, for "[i]n the context of the statute's precisely drawn provisions, this omission provides persuasive evidence that Congress deliberately intended" not to require a "comparabl[y]" individualized consideration of residual abilities and non-medical factors. *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982); see also *United States* v. *Fausto*, 108 S. Ct. 668, 673 (1988); *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 347 (1984).

The legislative history likewise suggests the deliberate nature of paragraph (B)'s omission of any reference to children. In describing this provision, the House Report explicitly noted that the inquiry into the claimant's ability to work—and therefore into the effect that his age, education and work experience might have on his ability to work—should not be conducted in the case of children. The House Report explained:

> an individual *(other than a child under age 18)* [will be determined to be under a disability only if his physical or mental impairment or impairments are of such severity] * * * that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work * * *.

H.R. Rep. No. 231, 92d Cong., 1st Sess. 148 (1971) (emphasis added). This legislative history, albeit terse, tends to support the proposition that if Congress harbored any specific intention on the question presented, it was that an individualized assessment of non-medical factors and functional capacity was *not* required with respect to children.

3. We also think it significant that Congress was made aware of the Secretary's general approach to child's disability benefits in 1976; yet, far from disapproving that approach, Congress responded with legislation mandating that the Secretary "publish" his criteria that implemented that approach. This legislation, adopted not long after enactment of the original SSI program in 1972 (and coming close on the heels of the adoption of the Secretary's original regulations in 1974), strongly suggests that Congress (at least the Congress of 1976) perceived no conflict between the Secretary's approach and the statute. As this Court has observed, "it may not always be realistic to infer approval of a judicial or administrative interpretation from congressional silence alone. * * * But once an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979) (citations omitted). See also *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 535 (1982); *CBS, Inc.* v. *FCC*, 453 U.S. 367, 382 (1981).

As discussed more fully below (see pages 36-38 *infra*), the Secretary's method of adjudicating child's disability claims without any individualized consideration of vocational or other non-medical factors was fully formed in 1974. On January 11, 1974, the Secretary published for comment the proposed regulations governing determinations of disability under the SSI program, which had just gone into effect on January 1, 1974. See 39 Fed. Reg. 1624 (1974). Those regulations provided that disability "shall be deemed to exist for a child under age 18" if (1) he is not engaged in substantial gainful activity, (2) his impairment meets the durational limitations for adults, and (3) his impairment is included in the Listing in Appendix 1, or, if not listed, "is determined by the [Social Security] Administration, with appropriate consideration of the particular effect of disease processes in childhood, to be medically the equivalent of a listed impairment" (39 Fed. Reg. 1626 (1974), adding 20 C.F.R. 416.904). After receiving and reviewing public comments, the Secretary published the regulations in final form on July 29, 1975. 40 Fed. Reg. 31,778, 31,783 (1975).

Contemporaneously with the publication of the proposed regulations, SSA sent Supplement 1 to Disability Insurance Letter III-11 to the state agencies on January 9, 1974, in an effort to elaborate on the guidance necessary for them to begin the adjudication of claims. See J.A. 94-114. The supplementary letter noted that the proposed regulations "specifically require[] that a child's impairment or impairments must either *meet* or *equal* the listing of impairments which will be published in an appendix" (J.A. 95 (emphasis in original)). It accordingly furnished materials to assist the recipient agencies in determining which criteria in the adult Listing could be used in evaluating children (J.A. 101-103), as well as a list of "childhood impairment guides" to assist in determining whether a child's impairment was equivalent in severity to a listed impairment, taking into account

special considerations in children (J.A. 104-114). Those informal "guides" described impairments "the impact of which will interfere with the child's major activities (i.e., growth and development) to the same extent as the impact of the impairments listed in the adult criteria interfere with the adult's ability to engage in substantial gainful activity" (J.A. 97). It was expected that after sufficient experience had been gained in applying the guides and supplemental criteria were developed, they would be published in the regulations themselves as part of a separate Listing applicable to children (J.A. 95).

After some delay in developing published criteria, several state agencies and other interested groups expressed concern to Congress during its oversight of the commencement of the SSI program that SSA had not issued more specific or definitive guidelines to implement the general principles embodied in the regulations. See S. Rep. No. 1265, 94th Cong., 2d Sess. 24-25 (1976).[21] In the legislative deliberations that followed, and ultimately resulted in the enactment of Section 501(b) of the Unemployment Compensation Amendments of 1976, there can be no doubt that Congress was fully apprised of the Secretary's methodology.[22] As the Senate Report on the 1976 Act recognized, quoting the central regulatory provision, "[t]he regulations which have been issued

[21] See also *Supplemental Security Income Program: Hearings Before the Subcomm. on Public Assistance of the House Comm. on Ways and Means*, 94th Cong., 1st Sess. 329, 349, 354, 363-364, 520, 535, 538, 541, 548, 781-782 (1975) [hereinafter *1975 Hearings*].

[22] During oversight hearings on the SSI program in 1976, the Commissioner of Social Security summarized the use of the informal guides and evaluation concepts to adapt the adult Listing to children, and noted that he had sent a letter to the House Subcommittee on Public Assistance in July 1975 explaining SSA's approach. *Oversight of the Supplemental Security Income Program: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 94th Cong., 2d Sess. 21-22 (1976); see also *1975 Hearings* at 781-782.

with regard to disability for children state that if a child's impairments are not those listed, eligibility may still be met if the impairments 'singly or in combination . . . are determined by the Social Security Administration, with appropriate consideration of the particular effect of the disease processes in childhood, to be medically the equivalent of a listed impairment.'" S. Rep. No. 1265, *supra*, at 24. Section 501(b) of the 1976 Act did not question that basic approach. To the contrary, it was intended to ensure that the Secretary adopt without further delay more specific or definitive guidelines to implement the general principle of medical equivalence embodied in the regulations. S. Rep. No. 1265, *supra*, at 24-25. The Senate Report recognized the difficulty of developing "objective criteria" for determining how to apply the disability definition to children; but the Committee perceived a need for uniform guidance, and it noted that "SSA ha[d] been circulating draft regulations with criteria for child disability for some time" (*id.* at 25). The Senate Report also stated that the legislation was designed to "end the present uncertainty which the State agencies and others have with regard to what constitutes disability in a child." *Ibid.* The Secretary published for comment SSA's draft regulations and implementing criteria only three months after the 1976 Act was passed (41 Fed. Reg. 53,042 (1976)), and published them in final form two months later (42 Fed. Reg. 14,705 (1977)).

This history cannot be squared with the court of appeals' conclusion that the Listing approach embodied in the regulations published both before and after the 1976 Act was passed is "manifestly contrary" to the Act (*Chevron*, 467 U.S. at 844) and that Congress specifically intended to require the Secretary to engage in an individualized consideration of vocational factors or other non-medical factors and RFC in determining a claimant's eligibility for child's disability benefits. To the contrary, the ad hoc approach respondents advocate would,

if anything, be contrary to the 1976 Act's purpose of requiring the Secretary to furnish the States with objective standards to assure uniform administration.[23]

Moreover, Congress has never expressed disagreement with the manner in which the Secretary has implemented the child's disability program. Without suggesting any authoritative dimension to these materials, we note that in a report on the SSI program published soon after the regulations were promulgated in 1977, the Senate Finance Committee Staff noted the publication of the regulations without questioning their validity, observing that "[t]he nonmedical vocational factors were not applied to the children for basically the same reasons they had not been applied to disabled widows in earlier legislation, i.e., that as a group they had not had enough attachment to the labor force to make application of the factors feasible." Staff of Senate Comm. on Finance, *Report on SSI Program*, 95th Cong., 1st Sess. 125 (Comm. Print 1977). Again in 1979, the Senate Finance Committee Staff noted that the child's disability regulations published in March 1977 "were those needed to implement the childhood disability provisions of the SSI program." Staff of Senate Comm. on Finance, *Report on Issues Related to Social Security Act Disability Programs*, 96th Cong., 1st Sess. 20 (Comm. Print 1979). Our point is this: the manner in which the Secretary has implemented the "comparable severity" standard in 42 U.S.C. 1382c(a)(3)(A) has been brought to Congress's attention on a number of occasions. But despite comprehensive congressional oversight of the SSI program and the standards for determining disability (see, *e.g.*, *Schweiker*

[23] The House passed a bill in 1976 that likewise would have mandated the adoption of regulatory criteria for children, but would have expressly required the regulations to include "medical, social, personal, educational, and other criteria." 122 Cong. Rec. 27,853 (1976). Significantly, the provision Congress enacted as Section 501(b) of the 1976 Act did not include the quoted language.

v. *Chilicky*, 108 S. Ct. 2460, 2469 (1988); *Heckler* v. *Day*, 467 U.S. 104, 111-118 (1984)), including the extensive amendments made by the Social Security Disability Benefits Reform Act of 1984, Congress has never drawn into question, much less altered, the Secretary's regulatory approach.

C. The Child's Disability Regulations Are Based on a Contemporaneous and Longstanding Interpretation of the Statutory Standard That Is Both Reasonable and Fully Consistent with the Purposes of the Act

1. *The Secretary's Regulations Reflect a Longstanding and Contemporaneous Construction of the Act That Has Been Consistently Maintained for Over Fifteen Years*

This Court has emphasized on many occasions that administrative regulations are entitled to special deference where they "represent[] '"a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."'" *Aluminum Co. of America* v. *Central Lincoln People's Utility District*, 467 U.S. 380, 390 (1984), quoting *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Compare *Public Citizen* v. *Department of Justice*, No. 88-429 (June 21, 1989), slip op. 23 n.12. The Court has also held on many occasions that "longstanding" regulations that have been consistently maintained are entitled to comparatively greater deference than regulations that are relatively recent or have frequently been changed. See, *e.g.*, *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32-38 (1981); *Udall* v. *Tallman*, 380 U.S. at 16-17. Each of these descriptions applies with full force to the regulations at issue here: they were adopted contemporaneously with the implementation of the child's disability program; they have been in effect in their present form for over fifteen years; and they have been consistently maintained in that form throughout this lengthy period.

The regulatory methodology now drawn into question is the product of the exercise by the Secretary of his considered judgment, at the very outset of the SSI program, under the statutory grants of authority in 42 U.S.C. 405(a) and 1383(d)(1). It was adopted only after thorough study of the legal issues; consultation with medical and other experts; assessment of the Department's extensive experience in making disability determinations under the Title II insurance program during the preceding 18 years; utilization of notice-and-comment rulemaking procedures; and congressional oversight and approval.

As noted above (see page 33, *supra*), the Secretary's basic approach to evaluation of child's disability claims was promulgated in formal regulations published in 1977. That approach was first articulated, however, in 1973 in SSA Disability Insurance Letter No. III-11 (J.A. 89-93). DIL III-11 was sent to state agencies responsible for disability determinations on September 7, 1973, during the period that Congress afforded the Secretary to prepare for the commencement of the SSI program on January 1, 1974.[24] The Letter explained the basic rationale for the approach SSA planned to pursue (and has pursued ever since) (J.A. 90-91 (emphasis in original)):

> Historically, the term "disability" has, under title II, been associated exclusively with an inability to work, which is the primary activity of adults. This term, when applied to children, cannot properly be associated with an inability to work, since children

[24] SSA observed that with the impending implementation of the SSI program, it would be responsible for the first time for evaluating children under the age of 18, and that there was no organization known to exist that had a large scale program involving this type of disability evaluation. For this reason, SSA explained, evaluation criteria would be based on: "(1) experience drawn from the title II disability program insofar as it may relate to children; and (2) expertise provided by medical authorities, particularly by experts in the field of childhood diseases and impairments" (J.A. 89).

> are not ordinarily expected to engage in such activity. Accordingly, disability in children must be defined in terms of the primary activity in which they engage, namely growth and development, the process of maturation. Additionally, * * * the impact of the disease may be quite different [in children]. * * *
>
> These factors make it impossible to compare directly the severity of the child's impairment with that of an impairment which would prevent an adult from engaging in SGA [substantial gainful activity]; thus, in applying the guides, "comparable severity" means that the severity *of the impact* of the child's impairment(s) must be "comparable" to the severity *of the impact* of an impairment(s) which would prevent an adult from engaging in any substantial gainful activity. In applying this concept to adjudication, childhood disability will be determined solely in consideration of medical factors.

DIL III-11 further explained that "[v]ocational factors *will not* be considered in the evaluation of childhood disability," because "[t]he application of such factors would be inappropriate since the primary activities of children are not generally measured in vocational terms" (J.A. 91 (emphasis in original)).

In addition, the state agencies were informed that the Listing of Impairments (used to evaluate adult disability claims under Title II solely on the basis of medical factors) would be utilized to the extent feasible to evaluate SSI child's claims as well. However, SSA recognized that some of those listings would be inappropriate to use in evaluating children, and it stated that supplementary guides would be issued to explain how the Title II Listing for adults, including the concept of medical equivalence, would be adapted to the special circumstances of the child's disability program. SSA also stated that after it carefully analyzed the adjudicative experience with these guides, "[p]ermanent evaluation criteria will be formally issued at a later date" (J.A. 92).

Thus, the basic contours of the approach to evaluating claims for child's disability benefits were in place before the SSI program even went into effect on January 1, 1974. That approach embodied the essential elements of the child's disability program as it exists today: determinations based on medical factors alone, measuring the severity and impact of the impairment itself; use of the Listing for that purpose; identification of criteria under the Listing on the basis of a legislative-type assessment of each listed impairment's impact on a child's development; and no individualized consideration of vocational or other non-medical factors (or, therefore, of RFC).

As the Secretary contemplated in 1974 (and as Congress specifically directed in 1976), the special medical criteria against which a child's impairments are to be measured were subsequently elevated to the form of a supplemental Listing. The Listing also incorporated additional and more detailed criteria based on the accumulated experience gained during the first several years of the SSI child's disability program. The regulations were proposed on December 3, 1976 (41 Fed. Reg. 53,042) and were formally adopted on March 16, 1977 (42 Fed. Reg. 14,705).

Those regulations retained the general standards of disability for children that were contained in 20 C.F.R. 416.904 (1976), including the general requirement that a child's impairment must meet a listed impairment or be "determined by the Social Security Administration, with appropriate consideration of the particular effect of disease processes in childhood, to be medically the equivalent of a listed impairment" (42 Fed. Reg. 14,707-14,708 (1977)). But in order to furnish more specific guidance, the regulations added a new Part B to the Appendix of listed impairments (42 Fed. Reg. 14,708 *et seq.* (1977)), which contained "[a]dditional medical criteria" for the evaluation of children where the criteria in Part A do not give appropriate consideration to the "particular

disease process in children" (*id.* at 14,708). The Secretary made clear in the preamble to these regulations, however, that the special criteria in the Part B Listing did not contain new *substantive* standards, but rather were intended to "clarify existing adjudicative guides" (those previously furnished by SSA in DIL III-11 and supplements thereto) and to "facilitate the decision making process" by furnishing specific criteria directly applicable to children. *Id.* at 14,705. As a result, the Secretary stressed, "determinations of disability of children * * * have been made and will continue to be made under the authority provided in [20 C.F.R.] 416.904 and in consideration of the basic requirements stated therein" (*ibid.*), which include the requirement that the impairment meet or equal the Listing.

The preamble to the final regulations explained that the special medical criteria for children "were developed and formulated over a 2-year period by the Social Security Administration Medical Consultant Staff together with practicing physicians, and other professionals, such as psychologists, who are experts in various specialties, primarily pediatrics," and that "[s]everal groups in the medical community were requested to comment on those medical criteria as they were being formulated" (42 Fed. Reg. 14,705 (1977)). The preamble further explained that in identifying impairments and the level of severity that would establish disability, "these professionals placed primary emphasis on the effects of physical and mental impairments in children, the impact of the impairment on the child's activities, and the restrictions on growth, learning, and development imposed on the child by the impairments. Those impairments which were determined to impact on the child's development to the same extent that the adult criteria have on an adult's ability to engage in substantial gainful activity were deemed to be of 'comparable severity' to the adult listing." All the listed impairments have a disabling impact on the child's development in one form or another—physical, mental, emotional, or social. *Id.* at 14,705-14,706.

In response to comments, the preamble to the final regulations also specifically addressed several of the considerations respondents now raise. First, in response to a comment that SSA "interprets severity [of an impairment] in medical rather than functional terms," the Secretary explained that that interpretation was necessitated by 42 U.S.C. 1383c(a)(3)(C), which specifies that a physical or mental impairment be one that is "demonstrable by medically acceptable clinical and laboratory diagnostic techniques." At the same time, the Secretary noted that the new medical criteria in the regulations "do result in functional limitations or restrictions, depending on the nature of the impairments, and these have been considered." 42 Fed. Reg. 14,706 (1977).

Second, the Secretary pointed out that the approach for evaluating children is flexible, explaining that the listed impairments "provide a means to efficiently and equitably evaluate the more common impairments" and also allow a claimant to establish eligibility by showing that he has an impairment or combination of impairments that are medically equivalent to a listed impairment. 42 Fed. Reg. 14,706 (1977).

Third, in response to comments that the regulations should be broadened to include developmental needs, the Secretary noted that the medical criteria in the Listing "do consider developmental levels" and that "[m]any of the criteria were established by considering disability in terms of departures from developmental norms at various levels." 42 Fed. Reg. 14,706 (1977). These criteria take into account physical, mental, and emotional development, and incorporate developmental milestones where they apply. *Ibid.* By the same token, the Secretary explained that developmental needs—*e.g.*, counseling, special education, training, rehabilitation, and guidance—are not considered as such, "because they are not within the scope of the law." *Ibid.*

Fourth, the Secretary rejected the proposition that a child be denied benefits if he actually performs age-

appropriate activities, just as an adult is denied benefits if he is actually engaged in substantial gainful activity. He explained that such a standard for all impairments would be "unduly restrictive and not within the intent of the law." 42 Fed. Reg. 14,706 (1977).

As the foregoing discussion makes clear, the Secretary's construction of the "comparable severity" standard in 42 U.S.C. 1382c(a)(3)(A) to permit the regulatory approach that the court of appeals invalidated on its face was adopted at the very outset of the SSI program and reaffirmed in greater detail in light of initial experience under the programs (and consideration of issues very similar to those now raised by respondents). This long-standing and consistently maintained interpretation of the statute is entitled to great deference.

2. *The Secretary's Methodology for Adjudicating Child's Disability Cases Is Reasonable and Consistent with Congress's Purposes In Extending SSI Disability Benefits to Children*

For the reasons given by the Secretary both in adopting his regulatory approach to children's disability benefits in 1973 and in reaffirming that approach when formal regulations augmenting the Listing were promulgated in 1977, it can scarcely be maintained that the methodology chosen to implement the statutory directive is "arbitrary, capricious, or manifestly contrary to the statute." *Atkins* v. *Rivera*, 477 U.S. at 162; see *Yuckert*, 482 U.S. at 145.

The court of appeals faulted the Secretary's regulations as "too restrictive" because they did not afford children "the opportunity for individual evaluations comparable to the residual functional capacity assessment for adults." Pet. App. 16a, 17a. This concern is misguided. The regulations *do* require that each child who applies for benefits be evaluated on an individualized basis. The regulations provide for an individualized assessment by allowing each child to establish the severity of his own impairment and to qualify for benefits by showing that

his impairment meets or exceeds any impairment listed in either Part A or Part B of the Listing or is the medical equivalent of any such impairment. See *Hinckley*, 742 F.2d at 23.

Nor is it true, as the court below surmised, that the child's disability regulations are divorced from functional considerations. To the contrary, some of the criteria in Part B explicitly call for an assessment of a child's functional capacity where such an assessment is relevant in measuring the severity of the impairment. See, *e.g.*, 101.03(C) ("[i]nability to perform age-related personal self-care activities involving feeding, dressing, and personal hygiene"); 111.06 ("Persistent disorganization or deficit of motor function * * * which * * * interferes with age-appropriate major daily activities"); 112.03 (psychosis resulting in "marked restriction in the performance of daily age-appropriate activities * * * [and] deficiency of age-appropriate self-care skills"). The regulations focus, however, not on the individual child's ability to function as such, but on the impact of the impairment on his physical, mental, and emotional growth and development. An assessment of functional abilities will normally be subsumed in applying these standards. Moreover, as noted above, if, as respondents allege, there are any "gaps" in the Secretary's Part B Listing (Br. in Opp. 24)—that is, if experience reveals that the Listing overlooks certain impairments that have a severe impact on childhood growth and development, or inadequately gauges the impact of a specific impairment on childhood development—the solution is not to jettison the entire regulatory framework. Rather, as the district court observed, the proper remedy is to challenge particular Part B listings (or the absence of such listings) on judicial review of the denial of disability benefits.

The Secretary's decision not to provide for an individualized assessment of a child's residual functional capacity is also supported by powerful practical consider-

ations. Simply put, an assessment of residual functional capacity or functional impairment cannot exist in a vacuum. The relevant question is, functional capacity to do *what*? With respect to adults, the Secretary is instructed to inquire into an individual's functional capacity to engage in "substantial gainful activity," *i.e.*, to work. Ability to work thus provides a single, objective benchmark against which a person's individual nonmedical attributes—his age, education, and previous work experience—can be assessed. As the Secretary has recognized from the outset of the program, however, the assessment of disability in children "cannot properly be associated with an inability to work, since children are not ordinarily expected to engage in such activity." J.A. 90.

Although the court of appeals would require the Secretary to make "individual evaluations comparable to the residual functional capacity assessment for adults" (Pet. App. 17a), it offered no suggestion as to how this was to be done. A case-by-case evaluation of whether a child, *if* he were an adult, would be disabled, would be wholly unworkable. Adults are evaluated on the basis of their age, education and work experience. If this process were extended to children, how old, how educated, and how experienced should the "hypothetical" adult be? It is also significant that if an adult is considered disabled only because one or more of these vocational factors is adverse—*i.e.*, the claimant is of or approaching advanced age, is relatively lacking in education, or does not have work experience that is readily transferable to other jobs—the basis of his disability is not the "severity" of the impairment standing alone, but the impairment plus one or more other factors that are irrelevant for children. Put another way, the impairment of such an adult is not one that would in itself render *all* adults disabled, and it therefore is not one that attains the level of severity to which the impairments in *all* children can meaningfully be compared.

If, as the Secretary firmly believes, the ability-to-work criterion specified by Congress for use with adults cannot be applied directly to children, there is no analogous benchmark that can feasibly be adopted for use with children. Virtually any substitute formulation, for example, ability to engage in "age-appropriate activities" (Br. in Opp. 28), would be so amorphous that it would provide, at best, a fertile field for disagreement among experts. It would manifestly not provide a workable standard suitable for application in thousands of individual disability adjudications.[25] Moreover, any such substitute formulation would have no foundation in the text of the statute. If Congress intended to require an individualized assessment of functional capacity in children's disability cases (and for the reasons discussed above, we believe it did not), Congress paid no attention at all to the need for an appropriate and workable benchmark to orient that inquiry. The complete absence of congres-

[25] There is thus no contradiction between the fact that the Secretary has taken functional considerations into account in developing the Part B Listing, and yet has declined to direct adjudicators to make an assessment of residual functional capacity or other nonmedical factors with respect to children on a case-by-case basis. The development of the special Listing involves precisely the type of generalized inquiry where conflicting views of medical and psychological experts can be weighed and sifted, and an informed judgment can be reached as to the most likely impact of any given impairment in the typical case. This process, which involves multiple layers of review and can be quite time-consuming, results in the development of a standard (a new or revised Listing) which can then be applied in individual cases. In the context of an individual adjudication, in contrast, it would be necessary to take extensive evidence and develop a considerable record *both* to determine the relevant standard (what sorts of activities would be appropriate for a child of a given age and background) *and* to determine whether the particular claimant satisfied that standard. To require the Secretary to resolve these issues "at each hearing would hinder needlessly an already overburdened agency." *Campbell*, 461 U.S. at 468.

sional guidance on this question strongly supports the Secretary's decision to forgo any such inquiry.

More generally, the Secretary's regulatory approach accords with the different purposes underlying the disability programs for adults and children. The purpose of disability benefits for adults is to ensure "the basic means of replacing earnings that have been lost as a result of * * * disability" for those who "are not able to support themselves through work * * *." H.R. Rep. No. 231, *supra*, at 146-147. For this reason, insofar as adults are concerned, "[t]he Social Security Act defines 'disability' in terms of the effect a physical or mental impairment has on a person's ability to function in the workplace." *Heckler* v. *Campbell*, 461 U.S. at 459-460 (interpreting identical definition of disability in 42 U.S.C. 423(d)(2)(A)). In light of this purpose, it is appropriate for adults to be evaluated not only in terms of the severity of their impairment but also in terms of their residual functional capacity to perform work.

By contrast, Congress had a different set of considerations in mind in providing for children's SSI benefits. Recognizing that disabled children from low-income households are "among the most disadvantaged of all Americans," Congress thought that special disability benefits would be appropriate for such children "because their needs are often greater than those of nondisabled children." H.R. Rep. No. 231, *supra*, at 147-148. In other words, the aim of Congress in establishing children's disability was not to replace lost income, but to provide for the special health care needs of disabled children, such as home health care expenses arising out of a child's medical impairment. It is entirely consistent with this quite distinct purpose to focus consideration on the severity of the child's impairment from a medical perspective alone, without individualized consideration of vocational or similar factors or the claimant's residual functional capacity. A child's special needs will of neces-

sity be determined by the nature and severity of his impairment, not by his ability to contribute to the family's income.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

JOHN F. CORDES
MATTHEW M. COLLETTE
Attorneys

JULY 1989

APPENDIX

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 1614(a)(3)(A) of the Social Security Act, as codified at 42 U.S.C. 1382c(a)(3)(A), provides:

> An individual shall be considered to be disabled • • • if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity).

2. Section 1614(a)(3)(B) of the Social Security Act, as codified at 42 U.S.C. 1382c(a)(3)(B), provides in pertinent part:

> For purposes of subparagraph (A), an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy • • •.

3. Section 501(b) of the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2685, provides:

> **Publication of Criteria.**—The Secretary shall, within 120 days after the enactment of this subsection, publish criteria to be employed to determine disability (as defined in section 1614(a)(3) of the Social Se-

curity Act) in the case of persons who have not attained the age of 18.

4. 20 C.F.R. 416.924 provides:

We will find that a child under age 18 is disabled if he or she—

(a) Is not doing any substantial gainful activity; and

(b) Has a medically determinable physical or mental impairment(s) which compares in severity to any impairment(s) which would make an adult (a person age 18 or over) disabled. This requirement will be met when the impairment(s)—

(1) Meets the duration requirement; and

(2) Is listed in Appendix 1 of Subpart P of Part 404 of this chapter; or

(3) Is determined by us to be medically equal to an impairment listed in Appendix 1 of Subpart P of this chapter.

5. 20 C.F.R. 416.925 provides:

(a) **Purpose of the Listing of Impairments.** The Listing of Impairments describes, for each of the major body systems, impairments which are considered severe enough to prevent a person from doing any gainful activity. Most of the listed impairments are permanent or expected to result in death, or a specific statement of duration is made. For all others, the evidence must show that the impairment has lasted or is expected to last for a continuous period of at least 12 months.

(b) **Adult and childhood diseases.** The Listing of Impairments consists of two parts:

(1) *Part A* contains medical criteria that apply to adult persons age 18 and over. The medical criteria in Part A may also be applied in evaluating impairments in persons under age 18 if the disease processes have a similar effect on adults and younger persons.

(2) *Part B* contains additional medical criteria that apply only to the evaluation of impairments of persons under age 18. Certain criteria in Part A do not give appropriate consideration to the particular effects of the disease processes in childhood; i.e., when the disease process is generally found only in children or when the disease process differs in its effect on children than on adults. Additional criteria are included in Part B, and the impairment categories are, to the extent possible, numbered to maintain a relationship with their counterparts in Part A. In evaluating disability for a person under age 18, Part B will be used first. If the medical criteria in Part B do not apply, then the medical criteria in Part A will be used.

(c) **How to use the Listing of Impairments.** Each section of the Listing of Impairments has a general introduction containing definitions of key concepts used in that section. Certain specific medical findings, some of which are required in establishing a diagnosis or in confirming the existence of an impairment for the purpose of this Listing, are also given in the narrative introduction. If the medical findings needed to support a diagnosis are not given in the introduction or elsewhere in the listing, the diagnosis must still be established on the basis of medically acceptable clinical and laboratory diagnostic techniques. Following the introduction in each section, the required level of severity of impairment is shown under "Category of Impairments" by one or more sets of medical findings. The medical findings consist of symptoms, signs, and laboratory findings.

(d) **Diagnoses of impairments.** We will not consider your impairment to be one listed in Appendix 1 of Subpart P of Part 404 of this chapter solely because it has the diagnosis of a listed impairment.

It must also have the findings shown in the Listing for that impairment.

(e) **Addiction to alcohol or drugs.** If you have a condition diagnosed as addiction to alcohol or drugs, this will not, by itself, be a basis for determining whether you are, or are not, disabled. As with any other medical condition, we will decide whether you are disabled based on symptoms, signs, and laboratory findings.

6. 20 C.F.R. 416.926 provides:

(a) **How medical equivalence is determined.** We will decide that your impairment(s) is medically equivalent to a listed impairment in Appendix 1 of Subpart P of Part 404 of this chapter if the medical findings are at least equal in severity and duration to the listed findings. We will compare the symptoms, signs, and laboratory findings about your impairment(s), as shown in the medical evidence we have about your claim, with the medical criteria shown with the listed impairment. If your impairment is not listed, we will consider the listed impairment most like your impairment to decide whether your impairment is medically equal. If you have more than one impairment, and none of them meets or equals a listed impairment, we will review the symptoms, signs, and laboratory findings about your impairments to determine whether the combination of your impairments is medically equal to any listed impairment.

(b) **Medical equivalence must be based on medical findings.** We will always base our decision about whether your impairment(s) is medically equal to a listed impairment on medical evidence only. Any medical findings in the evidence must be supported by medically acceptable clinical and laboratory diagnostic techniques. We will also consider the medical opinion given by one or more medical or psychological

consultants designated by the Secretary in deciding medical equivalence. (See § 416.1016.)

(c) **Who is a designated medical or psychological consultant.** A medical or phychological consultant designated by the Secretary includes any medical or psychological consultant employed or engaged to make medical judgments by the Social Security Administration, the Railroad Retirement Board, or a State agency authorized to make disability determinations. A medical consultant must be a physician. A psychological consultant used in cases where there is evidence of a mental impairment must be a qualified psychologist. (See § 416.1016 for the qualifications we consider necessary for a psychologist to be a consultant.)

☆ U. S. GOVERNMENT PRINTING OFFICE, 1989 241099 00342